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No. 1040

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

IKE F. DAVIS, ET UX — Petitioners

v.

DEXTER BARR, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION, ET AL. — Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENTS IN OPPOSITION

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Respondents file this their brief in opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi on the ground that the aforesaid Petition not having been filed within the time provided by law, this Court is without authority to grant the petition.

The decision of the Supreme Court of the State of Mississippi was rendered in this case on a date not shown in the Petition for Certiorari (Appendix C to Petition for Certiorari, p. 30a), but the Petition for Certiorari shows that the decision overruling the Suggestion of Error was rendered on January 13, 1964. (Appendix

D to Petition for Certiorari, p. 20a). The Petition for Certiorari was filed with the Clerk of this Court on April 24, 1963, more than ninety (90) days from the date of the decision of the Supreme Court of Mississippi overruling Petitioners' Suggestion of Error in that Court.

28 USCA 2101 furnishes the jurisdictional basis of this Court in such cases:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

. . . .

"(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time, to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. . . ."

There is no showing in the Petition for Writ of Certiorari that a Justice of this Court extended the period for filing the Petition for Certiorari nor even that application for extension of time was made by Petitioners. There is certainly no authority in a Justice of the Supreme Court of Mississippi to extend the time for filing a Petition for Certiorari in this Court.

The filing of the Petition for Certiorari within the ninety days is the basis for jurisdiction of this Court. *Supreme Court Practice*, Third Edition, page 202, by Robert L. Stern and Eugene Gressman:

> "These time limits are jurisdictional. Unless an extension is obtained from a Justice of the Supreme Court or at least applied for through the Clerk . . . before the expiration of the time, the petition and record must be received in — not mailed to — the office of the Clerk of the Supreme Court by the ninetieth day. The time cannot be extended by waiver or stipulation of the parties."

28 USCA 2101 (f) does not deal with the jurisdiction of this Court but merely with the right of the lower court to stay the issuance of the mandate from that Court. It does not enlarge nor does it purport to enlarge the statutory time for the filing of the Petition for Writ of Certiorari in this Court and it is respectfully submitted that the Order of the Supreme Court of the State of Mississippi purporting to enlarge the statutory time is in fact a nullity and should be entirely disregarded by this Court in computing the time within which petitioners were required by the statute to file their petition in this Court. The aforesaid subsection deals only with the execution and enforcement of the judgment of the lower court and cannot change the provisions of 28 USCA 2101 (c) nor Rule 22 of this Court.

For the foregoing reasons it is respectfully submitted that this petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOE T. PATTERSON, Attorney General
State of Mississippi

BY

JOHN E. STONE, Assistant
Attorney General
New Capitol
Jackson, Mississippi

CERTIFICATE

I, John E. Stone, attorney for the respondents, in this cause, certify that I have this day mailed, postage prepaid to both Honorable Lyle V. Torey, P. O. Box 1413, Meridian, Mississippi, and Honorable deQuincy V. Sutton, Lamar Hotel, Meridian, Mississippi, true copies of the above and foregoing motion.

This the day of May, 1964.

Joe T. Patterson, Attorney General

By

John E. Stone, Assistant
Attorney General
New Capitol Building
Jackson, Mississippi